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**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S MOTION TO
DISMISS MAHER TERMINALS, LLC'S COMPLAINT AND REQUEST FOR A
STAY OF LITIGATION PENDING THE PRESIDING OFFICER'S
RESOLUTION OF THE 08-03 LITIGATION OR, AT MINIMUM, PENDING
DECISION ON THE PORT AUTHORITY'S MOTION TO DISMISS**

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND.....	3
I. The Port Authority’s Change Of Control Practices	3
II. APM’s Capital Expenditure Obligations	5
III. The Port Authority’s Leasing Practices	6
IV. The PNCT Terminal Expansion.....	6
V. The Port Authority’s Lease With Global Terminal & Container Services, LLC (“Global”)	7
ARGUMENT	8
I. Maher’s New Complaint Lacks Any Merit And Should Be Dismissed.....	8
A. Maher’s Claims Based On Purported Allowances Granted To APM And Change Of Control Practices Must Be Dismissed For Multiple Reasons, Including Collateral Estoppel, Failure To Meet Pleading Standards, and the Statute of Limitations.....	8
1. Maher Cannot Relitigate Its Meritless Objections To The Settlement Agreement In The 07-01 Action	8
2. Maher’s Claims Otherwise Fail To Plead Facts Sufficient To State A Claim Under The Shipping Act.....	14
3. Maher’s Claims Are Barred By The Statute Of Limitations	18
B. Maher’s Claims Based On Lease Provisions Not Found In Maher’s Lease Must Be Dismissed For Lack Of Standing And Ripeness	21
C. Maher Fails To State Claims Concerning The PNCT Terminal Expansion And The Letting Of The Global Terminal Upon Which Relief Can Be Granted.....	27
1. Maher Fails To Allege Sufficient Facts To Support Its Conclusory Allegations That The Port Authority Provided Unduly Preferential Treatment To PNCT Based On Status	27

TABLE OF CONTENTS
(continued)

	Page
2. Maher Fails To Allege Sufficient Facts To Support Its Conclusory Allegations That The Port Authority Unreasonably Refused To Deal Or Negotiate With It For The Letting of The Global Terminal.....	29
II. To The Extent That Maher's Claims Are Not Dismissed, They Should Be Stayed Until After Resolution Of Its 08-03 Action Or, At Minimum, Until The Port Authority's Motion To Dismiss Is Decided	30
A. The Landis Standard Applies To This Request For A Stay Pursuant To The Presiding Officer's Authority Over His Own Docket	31
B. This Action Should Be Stayed Until After The Full and Final Resolution of the 08-03 Action.....	33
C. Alternatively, This Action Should Be Stayed Until The Port Authority's Motion To Dismiss Is Decided.....	37
CONCLUSION.....	39

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Agreement No. 201158: Docking & Lease Agreement by and between City of Portland, Maine and Scotia Prince Cruises Ltd.,</i> 30 S.R.R. 377 (FMC 2004).....	34
<i>Alex Parsinia d/b/a Pac. Int'l Shipping & Cargo Express,</i> 27 S.R.R. 1335 (ALJ 1997)	26
<i>APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.,</i> 31 S.R.R. 250 (ALJ 2008)	passim
<i>Ashcroft v. Iqbal,</i> 556 U.S. 662 (2009).....	passim
<i>A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro.</i> 25 S.R.R. 1061 (FMC 1990).....	26
<i>Bell Atl. Corp. v. Twombly,</i> 550 U.S. 544 (2007).....	14, 15, 17, 27, 28
<i>Canaveral Port Authority - Possible Violations of Section 10(b)(10).</i> 29 S.R.R. 1436 (FMC 2003).....	34
<i>Carolina Marine Handling, Inc. v. S. Carolina State Ports Auth.,</i> 28 S.R.R. 1595 (ALJ 2000)	32
<i>Carson v. Am. Brands, Inc.,</i> 450 U.S. 79 (1981).....	32
<i>Ceres Marine Terminal v. Maryland Port Administration.</i> 27 S.R.R. 1251 (FMC 1997).....	33
<i>Ceres Marine Terminal v. Maryland Port Administration.</i> 29 S.R.R. 356 (FMC 2001).....	33
<i>Cherokee Nation of Okla. v. United States.</i> 124 F.3d 1413 (Fed. Cir. 1997).....	32
<i>Chilean Nitrate Sales Corp. v. Port of San Diego.</i> 24 S.R.R. 920 (FMC 1988).....	25
<i>Clinton v. Jones.</i> 520 U.S. 681 (1997).....	31

<i>CMAX, Inc. v. Hall</i> , 300 F.2d 265 (9th Cir. 1962)	37
<i>Gould v. Control Laser Corp.</i> , 705 F.2d 1340 (Fed. Cir. 1983).....	32
<i>Gov't of the Territory of Guam v. Sea-Land Serv., Inc.</i> , 29 S.R.R. 1509 (ALJ 2003)	22, 23
<i>Hecht v. P.R. Maritime Shipping Auth.</i> , 26 S.R.R. 1327 (ALJ 1994)	9, 10
<i>In re Sacramento Mun. Util. Dist.</i> , 395 F. App'x 684 (Fed. Cir. 2010)	32
<i>Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.</i> , 29 S.R.R. 306 (FMC 2001).....	19
<i>Kobel v. Hapag-Lloyd A.G.</i> , 32 S.R.R. 40 (ALJ 2011)	14
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248 (1936).....	32, 33, 36, 37
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	21
<i>Merswin v. Williams Cos., Inc.</i> , 364 F. App'x 438 (10th Cir. 2010)	19
<i>Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.</i> , 32 S.R.R. 126 (FMC 2011).....	14
<i>New Orleans S.S. Ass'n v. Plaquemines Port</i> , 23 S.R.R. 1363 (FMC 1986).....	9
<i>Oneida Motor Freight, Inc. v. United Jersey Bank</i> , 848 F.2d 414 (3d Cir. 1988).....	19
<i>Petchem, Inc. v. Canaveral Port Auth.</i> , 23 S.R.R. 480 (ALJ 1985)	24, 25
<i>Petition for an Investigation of, & for Section 19 Relief from, Italian Subsidies for Carnival Cruise Line Passenger Vessels</i> , 26 S.R.R. 990 (FMC 1993).....	22, 23

<i>Raines v. Byrd</i> , 521 U.S. 811 (1997).....	22
<i>Retired Chi. Police Ass'n v. City of Chicago</i> , 7 F.3d 584 (7th Cir. 1993)	10
<i>Reyn's Pasta Bella, LLC v. Visa USA, Inc.</i> , 442 F.3d 741 (9th Cir. 2006)	10, 12
<i>River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.</i> , 28 S.R.R. 751 (FMC 1999).....	22
<i>S.A. Chiarella DBA S.A. Chiarella Forwarding Co. v. Pacon Express Inc.</i> , 29 S.R.R. 335 (FMC 2001).....	25
<i>Seacon Terminals v. Port of Seattle</i> , 26 S.R.R. 886 (FMC 1993).....	25
<i>Sea-Land Dominicana S.A. & Sea-Land of P.R., Inc. v Sea-Land Serv., Inc.</i> , 26 S.R.R. 184 (ALJ 1992)	25
<i>Seatrains Gilmo, Inc. v. P.R. Mar. Shipping Auth.</i> , 18 S.R.R. 1079 (ALJ 1979)	19
<i>Tradecheck, LLC v. Sea-Land Serv. Inc.</i> , 27 S.R.R. 334 (FMC Settlement Officer 1995)	22
<i>UnionBankCal Corp. v. United States</i> , 93 Fed. Cl. 166 (2010).....	32, 37
<i>Ua. Petroleum Jobbers Ass'n v. Fed. Power Comm'n</i> , 259 F.2d 921 (D.C. Cir. 1958).....	33
<i>Weber v. Henderson</i> , 33 F. App'x 610 (3d Cir. 2002)	10
<i>Wolfson v. Brammer</i> , 616 F.3d 1045 (9th Cir. 2010)	22, 24
<i>World Line Shipping Inc. & Saeid B Maralan (aka Sam Bustani)</i> <i>Order to Show Cause</i> , 29 S.R.R. 384 (ALJ 2001).....	20, 21
<i>Zenith Radio Corp. v. Hazeltine Research Inc.</i> , 401 U.S. 321 (1971).....	19

STATUTES

46 U.S.C. § 41301(a)	18
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FILES\CONNECTION\OUTLOOK\UV621440\US ACTIVE 12-02 MOTION TO DISMISS COMPLAINT 43984465 20 (2) DOC

OTHER AUTHORITIES

46 C.F.R. § 502.12	14
46 C.F.R. § 502.282	26
46 C.F.R. § 502.283	26
Fed. R. Civ. P. 8	16
Fed. R. Civ. P. 8(a)	14
Fed. R. Civ. P. 12(b)(6)	14, 15
Fed. R. Civ. P. 33(a)(1)	35

Respondent the Port Authority of New York and New Jersey (the "Port Authority") moves the Federal Maritime Commission ("Commission") to dismiss Complainant Maher Terminal, LLC's ("Maher") Complaint ("Complaint") and, in the alternative, requests a stay of litigation in this matter, to the extent that it is not dismissed, pending the Presiding Officer's resolution of the 08-03 litigation or, at minimum, pending the decision on the Port Authority's motion to dismiss the Complaint.

PRELIMINARY STATEMENT

After four years of engaging in scorched earth litigation in the 08-03 action, Maher suddenly now brings this new Complaint against the Port Authority, alleging all manner of supposed Shipping Act violations, some of which have been adjudicated before, some having nothing to do with Maher, and others being patently frivolous. The 08-03 action has already required enormous expenditures and resources of both the Port Authority and the Commission. In typical fashion, Maher once again seeks to foment a plethora of additional unfounded disputes in a transparent attempt to harass the Port Authority and to impose additional, heavy burdens on it and the Presiding Officer. This is ironic because of Maher's long history of loud, though hollow, complaints that any delay in the resolution of the 08-03 action costs it money. The only effect of Maher pursuing its new, baseless claims against the Port Authority will be to distract the Presiding Officer from the enormous task at hand—the long-awaited determination of Maher's 08-03 claims.

Maher has already generated a mountain of unnecessary work for the Commission and the Port Authority, overburdening them with numerous baseless motions and other

disputes through its scorched earth and dilatory tactics.¹ Now, after several years, copious discovery, and extensive briefing, the 08-03 action is near completion. The parties have submitted their merits briefing and simply await the decision of the United States District Court for the Western District of New York on the Port Authority's motion to enforce a third-party deposition subpoena of the Commission so that the parties can complete discovery and supplemental briefing, as ordered by the Presiding Officer.² *See* Mar. 8, 2012 Scheduling Order at 2. Yet Maher, not content to let that process take its course and finally bring the enormous, long-litigated 08-03 action to a close, has now filed the 12-02 Complaint, broadly and vaguely alleging that the Port Authority engaged in a hodgepodge of largely unspecified "unlawful" practices.

As is typical, Maher provides little, if any, factual content to support its new claims because Maher knows that the claims are, in fact, baseless. Indeed, as discussed below, Maher's claims set forth in this new proceeding are subject to dismissal because they either (1) have already been resolved in the course of the Presiding Officer's approval of the 07-01 settlement agreement, which was upheld by the full Commission, over Maher's meritless objections, (2) are barred by the statute of limitations, (3) are not ripe for litigation, or (4) lack *any* allegation of injury or factual support sufficient to plead a violation of the Shipping Act. By filing yet another complaint, purporting to set forth

¹ In the 08-03 action, Maher's counsel served on the Port Authority twelve sets of interrogatories and eleven sets of requests for production of documents, along with over fifteen discovery-related motions and impermissible surreplies, continuously creating disputes out of issues that, in the normal course, would routinely be agreed upon by counsel.

² This detour into federal court was necessitated by Maher's and its agent's Empire Valuation Consultants, LLC's ("Empire") flagrant defiance of the Commission's subpoena for the deposition of David Eidman, and of the Presiding Officer's January 18 Order enforcing that subpoena, leaving the Port Authority with no choice but to seek enforcement in federal court.

fourteen separate causes of action, based on this patchwork of legally improper and insufficient allegations, Maher makes a mockery of the Shipping Act, abuses this forum, and wastes the time and resources of the Commission and its Presiding Officers. Were complainants permitted to proceed to discovery based on this type of ill-pleaded and purposefully vague complaint, the Commission would be forced to hear all manner of specious actions and to permit predatory complainants to demand wide-ranging discovery of purported violations, when they cannot even properly allege that one occurred. This is certainly not a regime contemplated by the Shipping Act.

Accordingly, the Presiding Officer should dismiss Maher's 12-02 claims for the reasons explained below. Alternatively to the extent that any claims are not dismissed, the Presiding Officer should stay this action pending the full and final resolution of the pending 08-03 action or, at minimum, until the instant motion to dismiss is decided.³

FACTUAL BACKGROUND

On April 6, 2012, Maher served its Complaint in this proceeding nearly four years after commencing the 08-03 action against the Port Authority. In this action, Maher alleges a variety of unrelated claims concerning the Port Authority's dealings with marine terminal operators located in the New York/New Jersey Harbor, several of which Maher has previously raised in the 07-01 and 08-03 actions.

I. The Port Authority's Change Of Control Practices

Under the Port Authority's change of control policy, after it conducts the "appropriate due diligence," the Port Authority requires "entities . . . assuming ownership

³ On April 24, 2012, counsel for the Port Authority requested Maher's consent to a stay of this action pending the full and final resolution of the 08-03 action or at least until the Presiding Officer decides the Port Authority's motion to dismiss. Counsel for Maher failed to respond.

or control interests of [a] lease or tenant [to] pay to the Port Authority such economic consideration as the Executive Director determines to be appropriate under the circumstances.” 12-02 Compl. ¶ IV(B). Maher alleges that, consistent with this policy, the Port Authority has required consent fees and other economic consideration from Maher, Port Newark Container Terminal (“PNCT”), and New York Container Terminals, Inc. (“NYCT”), among others, in exchange for its approval of certain changes of ownership or control of its tenants. *Id.* at ¶ IV(C).

Maher alleges that the Port Authority has applied its change of control policy inconsistently, which allegedly has unduly prejudiced Maher by “unjustly overcharging Maher for the benefit received.” 12-02 Compl. ¶¶ IV(D)-(F). Maher does not, however, set forth *any* facts in its Complaint as to how the Port Authority applied its policy inconsistently and unfairly or even which terminal operators supposedly benefited unfairly from the Port Authority’s alleged inconsistent application of its policy. Furthermore, Maher asserted this same type of allegation almost four years ago in objecting to the 07-01 settlement agreement between the Port Authority and APM Terminals (“APM”), and the Presiding Officer, in approving the settlement agreement, expressly rejected this allegation as meritless, as did the Commission in upholding the Presiding Officer’s approval of the settlement. *See* Initial Decision Granting Joint Mot. for Approval of Settlement Agreement & Dismissal with Prejudice at 36-40 (07-01), Oct. 24, 2008 (“Settlement Approval Opinion”); Order Denying Exceptions & Petition for Stay (07-01), Apr. 1, 2009, at 7-8 (rejecting this contention on appeal as one of those contentions too meritless even to warrant discussion).

II. APM's Capital Expenditure Obligations

As part of the terms of the settlement agreement in the 07-01 action, which, as noted, was approved by the Presiding Officer and the full Commission over Maher's baseless objections in 2008 and 2009, respectively, the Port Authority agreed to defer completion of APM's leasehold capital expenditure obligations of approximately \$50 million until 2017. 12-02 Compl. ¶ IV(X). The Port Authority did so as consideration for APM's complete release, for zero dollars, of its claim against the Port Authority for its failure to deliver certain land to APM by the time required by the Port Authority's lease with APM. Maher alleges that the Port Authority unreasonably granted APM an "undue preference" in deferring its capital expenditures, which also unduly prejudiced Maher because it did not receive such a deferral. *See id.* at ¶¶ IV(X), V(II), V(J), V(L). Maher's Complaint neglects to mention, however, that it presented this exact same claim in objecting to the approval of the 07-01 settlement agreement, which the Presiding Officer rejected out of hand, noting, *inter alia*, that Maher had not even requested such a deferral. *See* Settlement Approval Opinion at 37-38. The full Commission likewise rejected this contention on appeal in upholding the approval of the settlement. Order Denying Exceptions & Petition for Stay (07-01), Apr. 1, 2009, at 7-8 (rejecting this contention as one too meritless even to warrant discussion).

Maher's new Complaint further alleges that the Port Authority also permitted APM to use construction financing provided by the Port Authority "in amounts equal to or exceeding the costs of the deferred mandatory work, for other projects, including but not limited to, a large expansion of APM's container handling capacity." *See* 12-02

Compl. ¶ IV(Y). However, Maher does not even allege that such use was in any way inconsistent with existing lease terms.

III. The Port Authority's Leasing Practices

Maher alleges that, in entering into leases and lease extensions, modifications, and amendments, the Port Authority has a practice of unlawfully requiring (1) general releases and waivers, (2) liquidated damages provisions, and (3) lease rate renewal and extension provisions purporting "to set future rates not reasonably related to the cost of services provided." *See* 12-02 Compl. ¶¶ IV(U), V(D)-(F). Maher does not present any facts in its Complaint that show that Maher's lease includes any such provisions, that the Port Authority applied this practice to Maher's lease, or that Maher has been or could be injured in any way by the mere existence of any such provisions in the leases of other terminal operators.

IV. The PNCT Terminal Expansion

Maher alleges that at some unspecified time after Mediterranean Shipping Company ("MSC") transferred its container business from Maher to PNCT in October 2009, the Port Authority "announced an agreement with PNCT and MSC to expand the PNCT terminal and provide other concessions to PNCT." 12-02 Compl. ¶¶ IV(L), IV(Q). Maher claims that this agreement included the Port Authority "granting its consent for MSC's taking an ownership interest in PNCT, . . . lowering PNCT's lease rates. . . . agreeing to a terminal expansion . . . providing preferential chassis storage, [] extending the [PNCT] lease approximately 20 years in exchange for PNCT investing in the terminal," and guaranteeing certain levels of MSC cargo. *Id.* at ¶ IV(R). Maher alleges in conclusory fashion that this amounts to the Port Authority "providing unduly

preferential treatment to ocean carriers and ocean-carrier affiliated marine terminals” and that the Port Authority did not provide it with comparable “expansion opportunities, rate reductions, lease extension, or other preferences[.]” 12-02 Compl. ¶¶ IV(I), IV(S)-(T). Maher does not, however, allege any facts that support its conclusory allegations such as (1) that it requested the same opportunities given to PNCT, (2) that it offered or could have offered the Port Authority the same cargo and investment commitments that PNCT provided to the Port Authority in exchange for the expansion approval, or (3) that the resulting new arrangement with PNCT is in any fashion more favorable than Maher’s own existing lease terms.

V. The Port Authority’s Lease With Global Terminal & Container Services, LLC (“Global”)

In June 2010, the Port Authority “entered into a lease agreement with Global . . . for the operation of a marine terminal facility.” 12-02 Compl. ¶ IV(Z). Maher alleges that the Port Authority refused to deal or negotiate with Maher and other existing terminal operators with respect to the letting of the Global terminal. *Id.* at ¶¶ IV(V)-(W). Maher claims that it requested the opportunity from the Port Authority to negotiate for the letting of the Global terminal prior to the execution of the Global lease. *id.* at ¶ IV(AA), but fails to allege any facts that remotely support that the Port Authority *unreasonably* refused to deal with Maher or *unreasonably* excluded Maher from consideration as a prospective operator of the terminal, or that other terminal operators even expressed an interest in leasing the terminal.⁴

⁴ The reason for the absence of any such supporting factual allegations is obvious. Prior to the new lease with Global of the 170-acre terminal, Global was the fee owner of 100 of those acres.

ARGUMENT

I. Maher's New Complaint Lacks Any Merit And Should Be Dismissed

A. Maher's Claims Based On Purported Allowances Granted To APM And Change Of Control Practices Must Be Dismissed For Multiple Reasons, Including Collateral Estoppel, Failure To Meet Pleading Standards, and the Statute of Limitations

Two sets of claims in Maher's newest Complaint retread familiar grounds that it previously (and futilely) raised in the 07-01 action: claims relating to (1) the deferral of APM's capital expenditure obligations back in 2008, and (2) the Port Authority's change of control policy adopted in 2007. 12-02 Compl. ¶¶ IV(A)-(H), IV(X)-(Y), V(B), V(H)-(L), V(N); *see* 08-03 PAFOF ¶ 266. As Maher well knows, the Presiding Officer and the full Commission already considered those issues and rejected Maher's contentions in the course of approving the 07-01 settlement agreement. Maher is barred from relitigating them. Although Maher has attempted to broaden the allegations it makes, it fails to plead any facts in support of these allegedly "new" claims sufficient to survive a motion to dismiss. In any event, Maher's allegations based on long past events are clearly barred by the statute of limitations.

1. Maher Cannot Relitigate Its Meritless Objections To The Settlement Agreement In The 07-01 Action

Maher makes two claims that it previously raised as objections to the 07-01 settlement, both of which were expressly litigated, considered, and rejected on the merits, by the Presiding Officer and by the Commission on appeal. First, Maher alleges that the Port Authority engaged in an unreasonable practice and unreasonably prejudiced and refused to deal with Maher by agreeing to defer until 2017 APM's "leaschold capital expenditures" but not deferring Maher's. 12-02 Compl. ¶¶ IV(X), IV(BB), V(H), V(J).

V(L). Second, Maher further alleges that the Port Authority's practice of requiring "appropriate" "economic consideration" from terminal operators before giving consent to changes of control is unreasonable, has been disparately applied, and unjustly overcharged Maher, and that the Port Authority unreasonably refused to deal with Maher, because, among other things, Maher was subjected to "more prejudicial" requirements than were "Maersk [and] APM." *Id.* at ¶ V(I); *see also id.* at ¶¶ IV(Λ)-(H), IV(CC), V(B), V(N).⁵

Maher is barred by collateral estoppel from raising these allegations in its 12-02 Complaint because the Presiding Officer and the full Commission *expressly rejected* both of them in approving the 07-01 settlement agreement over Maher's objections that "the Settlement Agreement itself violate[d] the Shipping Act" on these grounds. among others. *See* Settlement Approval Opinion at 36-40; Order Denying Exceptions & Petition for Stay (07-01), Apr. 1, 2009, at 7-8. "[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Hecht v. P.R. Maritime Shipping Auth.*, 26 S.R.R. 1327, 1333 (ALJ 1994); *see also New Orleans S.S. Ass'n v. Plaquemines Port*, 23 S.R.R. 1363, 1370-72 (FMC 1986). Collateral estoppel "bars relitigation of issues adjudicated in an earlier proceeding if three requirements are met":

(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.

⁵ Further, while Maher alleges that *entirely unspecified* terminal operators were not required to pay change of control fees, 12-02 Compl. ¶ IV(D), the only terminal operator it has ever specified is APM.

Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006).

Each element of collateral estoppel is met as to Maher's allegations based on both the deferral of certain APM capital expenditures and the purported exemption of APM from change of control fees. First, Maher was a party to the 07-01 action, as both a third-party respondent and counter-complainant. Third Party Compl. ¶¶ 2-3 (07-01); Answer to Third Party Compl. & Counter-Compl. ¶¶ 33-41 (07-01). Moreover, the Presiding Officer's "approval of the settlement constituted a final judgment on the merits," which was then affirmed by the full Commission. Order Denying Exceptions & Petition for Stay (07-01), Apr. 1, 2009; *Reyn's Pasta Bella*, 442 F.3d at 746-47; *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 593 (7th Cir. 1993) ("a final judgment on the merits was reached" where, "[d]espite the intervenors' objections . . . the state court found the settlement agreement fair and entered an order approving the settlement and dismissing all claims with prejudice"); see also *Weber v. Henderson*, 33 F. App'x 610, 612 (3d Cir. 2002) ("[f]or purposes of res judicata, final judgment on the merits occurred when the District Court approved settlement and dismissed the case"). Finally, Maher's allegations that the Port Authority unreasonably deferred APM's capital expenditures, but not Maher's, and required Maher, PNCT, and NYCT, but not APM, to pay change-of-control fees were "actually" and "necessarily" adjudicated in the Presiding Officer's approval of the 07-01 settlement agreement and the denial of Maher's Exceptions therefrom by the Commission. *Reyn's Pasta Bella*, 442 F.3d at 746; *Ilecht*, 26 S.R.R. at 1333.

In adjudicating and rejecting Maher's objection that "the deferral of the completion date for APM's Class A Work discriminates against Maher," Settlement Approval Opinion at 36, the Presiding Officer relied upon the undisputed facts that

“Maher did not contact PANYNJ with a request to negotiate a deferral of the completion date” for its own Class A Work, and that, indeed, “Maher had completed its Class A Work prior to the date Lease EP-248 required APM to complete its Class A Work and prior to the date on which APM and PANYNJ reached their agreement to defer the completion date.” *Id.* at 37-38. The Presiding Officer then concluded:

A PANYNJ offer to Maher permitting Maher to defer its Class A Work after Maher had completed that work *would not make sense*. Furthermore, Maher knew or should have known from the fact that it did not complete its Class A Work until well after its Class A Work Completion Date that it could ask PANYNJ to defer that date. As stated above, if the evidence demonstrated that PANYNJ had refused to negotiate with Maher regarding deferral of its Class A Work Completion Date, but negotiated a deferral with APM, a finding that PANYNJ refused to negotiate or deal with Maher sufficient to justify disapproval of the settlement agreement might be justified. *This is not the case, however*. Therefore, the fact that Maher completed its Class A Work but the completion date of APM’s Class A Work will be deferred by the Settlement Agreement does not justify disapproval of the Settlement Agreement.

Id. at 38 (emphasis added).

The Presiding Officer similarly adjudicated and rejected Maher’s objection that “the ‘change of ownership’ provision in the Settlement Agreement for which APM pays nothing” was allegedly unlawful when compared with “requirements placed on Maher and other marine terminal operators to pay ‘tribute’ for consent to change of ownership interests.” Settlement Agreement at 36. Just as in this Complaint, Maher’s objection was based on “the payment of \$237 million in cash and investment” required of Maher, PNCT, and NYCT in return for consent to changes of control. *Id.* at 38; *see also* 12-02 Compl. ¶ IV(C) (alleging that the Port Authority required “\$237 million in such consideration” from PNCT, NYCT, and Maher). This objection was, and is, meritless because, as the Presiding Officer explained in approving the 07-01 settlement, the PNCT,

NYCT, and Maher changes in ownership each “involved transfer of an ownership interest in a lease from a PANYNJ lessee to an unaffiliated entity.” Settlement Approval Opinion at 39; *see id.* at 36. In contrast, the settlement agreement provision to which Maher objected *did not in fact concern or permit changes of control* for the APM terminal. Rather, it simply permitted transfer of interests to “an ‘affiliate’ of Maersk” over which “Maersk would still have the ultimate control.” *Id.* at 40. Thus, the Presiding Officer concluded that “[t]he APM ‘change in ownership’ provision [was] similar to the change in corporate structure for which Maher sought permission in 2006,” and for which, similarly, no fee was required. *Id.* Thus, Maher’s objection was meritless and “d[id] not preclude approval of the Agreement.” *Id.*

In order to “approv[e] the settlement,” the Presiding Officer “*necessarily* had to adjudicate the objections [Maher] raised” that the Settlement Agreement itself allegedly violated the Shipping Act, including on these two grounds. *Reyn’s Pasta Bella*, 442 F.3d at 746 (emphasis added); Settlement Approval Opinion at 36. “[T]he Commission does not merely rubber stamp any proffered settlement” but, rather, must find that “the settlement otherwise complies with law.” Order Denying Exceptions & Petition for Stay (07-01), Apr. 1, 2009, at 4; *id.* at 5 (“judges should not prevent parties from realizing the benefits of their settlement agreement *which does not violate law* and was freely negotiated”) (citing *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 89-90 (1981)). Thus, to approve the 07-01 settlement agreement, the Presiding Officer had to determine whether the deferral of APM’s Class A work and its purported exemption from change of control fees violated the Shipping Act. He concluded that they did not by expressly finding that “[t]he Agreement *does not create any new violations of the Shipping Act* and is consistent

with public policy and Commission precedent regarding approval of settlements.”⁶

Settlement Approval at 44. Maher litigated these very same issues again, together with the Presiding Officer’s supposed “procedural errors” in deciding these issues, in its Exceptions to the Presiding Officer’s Initial Decision approving the settlement.⁷ But the Commission rejected Maher’s contentions that these so-called “procedural errors” barred settlement and upheld the Presiding Officer’s approval of the 07-01 settlement agreement. *See* Order Denying Exceptions & Petition for Stay (07-01), Apr. 1, 2009, at 7-8. Accordingly, Maher is collaterally estopped from relitigating these issues in its 12-02 Complaint.

⁶ As the Commission found in upholding the settlement on appeal, while the Commission must determine that a settlement agreement itself “complies with law,” it need not determine, as to the *settled claims*, whether there was or was not a violation of the Shipping Act. Order Denying Exceptions & Petition for Stay (07-01), Apr. 1, 2009, at 4-5 (“[r]eaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent”). Thus, the Commission rejected Maher’s “assertion that, in approving a settlement, the ALJ and Commission must necessarily find that the Shipping Act has not been violated” because “approving a settlement does not entail a final adjudication of the merits and does not mandate either party to admit liability.” *Id.* at 5. With respect to objections raised to the lawfulness of the settlement itself, however, in which Maher raised the issues it now repleads, the Commission must, and did, adjudicate them to find that “the settlement otherwise complies with law.” *Id.* at 4, 8. And while the Commission further noted that “Maher’s own claims against the Port Authority” were not “foreclosed by approval of this settlement agreement,” it there referred to Maher’s 07-01 counter-claims, which did not reference these issues. *Id.* at 6 n.2 (“While all claims between the settling agreement parties would be dismissed, the counter-complaint by Maher in Docket 07-01 would remain active.”).

⁷ *See, e.g.*, Exceptions to Initial Decision Approving Settlement & Related Dismissals with Prejudice (07-01), Nov. 17, 2008, at 13, 16-17 (arguing that “Maher objected to the change of ownership consent as essentially permitting APM to spin off 50% of APM to a third party, and that pursuant to PANYNJ’s 2007 change of ownership interest policy and recent practices, was in fact a valuable undisclosed preference”; yet that the Presiding Officer purportedly improperly conducted its fact finding on this issue and improperly rejected the objection); *id.* at 18-19 (arguing that it had no notice or opportunity to be heard on the Presiding Officer’s finding, which Maher termed an “argument,” that “APM’s construction deferral does not discriminate against Maher because Maher did not ask PANYNJ to defer its Class A construction obligations before it completed them.”).

2. **Maher's Claims Otherwise Fail To Plead Facts Sufficient To State A Claim Under The Shipping Act**

To the extent that Maher's allegations premised on concessions to APM and change of control practices are not barred under collateral estoppel, they fail to allege sufficient factual matter to state any plausible claim for relief. Maher attempts to avoid the Presiding Officer's prior determination of its baseless objections to the 07-01 settlement agreement by broadening its allegations in the Complaint with general and conclusory language. But these vague new complaints are patently insufficient to state any claim under the Shipping Act and, accordingly, must be dismissed.

The Commission Rules of Practice and Procedure do not specifically address motions to dismiss for failure to meet pleading standards. When there is no specific Commission Rule, the Commission applies the Federal Rules of Civil Procedure ("Federal Rules") "to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. Rule 12(b)(6) of the Federal Rules governs motions to dismiss based upon a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A complaint fails to satisfy Rule 8(a) "notice" pleading and warrants dismissal under Rule 12(b)(6) when it does not "contain sufficient *factual* matter . . . to state a claim to relief that is *plausible* on its face."⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (emphasis added). To be plausible, a claim must go beyond pleading facts that raise a "mere possibility of misconduct"—instead, it must plead "*factual* content that allows the court to draw the

⁸ The Commission has adopted and applied the *Twombly* and *Iqbal* pleading standards established by the United States Supreme Court to motions to dismiss claims before the Commission. See, e.g., *Mitsui O S K Lines, Ltd v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011); *Kobel v. Hapag-Lloyd A G*, 32 S.R.R. 40, 42 (ALJ 2011).

reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (emphasis added). While the Presiding Officer must accept as true all *well-pleaded facts* and draw all *reasonable* inferences in Maher’s favor, a complaint stating “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” is not enough to survive a Rule 12(b)(6) motion. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555 (mere “labels and conclusions, and a formulaic recitation of the elements of a cause of action” are insufficient to survive a motion to dismiss)). Moreover, allegations that are “merely consistent with a defendant’s liability” do “not plausibly establish” a claim if there are “more likely explanations.” *Iqbal*, 556 U.S. at 678, 681.

First, as part of its challenge to APM’s “capital expenditure obligations,” *see* 12-02 Compl. at 6, Maher baldly alleges, in a single paragraph, that, “[i]n addition to consenting to the deferral of the required work [by APM], PANYNJ approved APM’s use of PANYNJ construction financing, in amounts equal to or exceeding the costs of the deferred mandatory work, for other projects, including but not limited to, a large expansion of APM’s container handling capacity.” *Id.* at ¶ IV(Y). Maher fails, however, to allege *any* facts to support that the use of financing for other projects violates the Shipping Act *in any way*. *See Iqbal*, 556 U.S. at 678 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).

Although Maher purports to bring an unreasonable practice claim on this basis, 12-02 Compl. ¶ V(H), Maher does not plead any facts to support its claim that an alleged “practice” of allowing the use of construction financing for other construction projects is

unlawful, or runs afoul of lease requirements, or, indeed, is anything other than routine performance of the parties' lease. Similarly, while Maher also asserts that such use gives rise to an unreasonable preference claim, *id.* at ¶ V(K), it does not even allege that it sought and was refused permission to use its construction financing for "other projects" similar to those undertaken by APM, as would be necessary to plead that the Port Authority in any way granted a concession to APM that was denied to Maher. Maher's further allegation that the Port Authority did "not provid[e] *additional* PANYNJ financing for other Maher projects, including Maher capacity extension," is a complete *non sequitur* as Maher does not allege that the Port Authority even provided any additional financing to APM as the basis for any legitimate preference claim. *Id.* (emphasis added). Nor does Maher bother to allege facts concerning the Port Authority's purported unreasonable refusal to deal with Maher for the deferral of capital expenditure obligations sufficient to "nudge[]" its claim "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680; *see also id.* at 678 (Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"): 12-02 Compl. ¶ V(I.).

Maher's vague, modified claims of unreasonable practice, 12-02 Compl. ¶ V(B), unreasonable prejudice, *id.* at ¶ V(I), and unreasonable refusal to deal, *id.* at ¶ V(N), premised upon the Port Authority's change of control policy likewise lack the requisite "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As to unreasonable prejudice, Maher claims that the Port Authority imposed more prejudicial change-of-control requirements upon it "than required of Maersk, APM, PNCT, NYCT, and other marine terminal operators." 12-02 Compl. ¶ V(I). As discussed above, this claim was

already rejected by the Commission as to Maersk and APM, and is barred by collateral estoppel. As to PNCT and NYCT, Maher fails to allege *any* facts to support that they received a preference (much less an unreasonable one). On the contrary, Maher alleges merely that PNCT and NYCT, like Maher, were *also* required to pay change of control fees. *Id.* at ¶ IV(C) (“PANYNJ has required payments of cash and commitments . . . including approximately \$237 million in such consideration with respect to Port Newark Container Terminal (‘PNCT’), New York Container Terminal, Inc. (‘NYCT’) and Maher.”). These allegations fail to state a cause of action for unreasonable preference. *See Twombly*, 550 U.S. at 555 (the complaint must be sufficient to “give the defendant fair notice of what the claim is and *the grounds upon which it rests*.”) (internal alterations and citation omitted) (emphasis added).

Moreover, Maher entirely fails to state a claim for an unreasonable practice based on change of control practices. 12-02 Compl. ¶ V(B). Although Maher does allege that it, as well as PNCT and NYCT, paid change of control fees while the Port Authority “has in other instances consented to transfers and/or changes of ownership and/or changes of interests without requiring payment,” Maher entirely fails to identify *even one terminal operator* that was not required to pay a fee for an actual change of control. 12-02 Compl. ¶¶ IV(C)-(D). This is insufficient to state a claim. *See Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level.”). Indeed, the only terminal operator as to which Maher has ever raised such a complaint is APM, and that claim has already been rejected. *See Part I(A)(1) supra*. While the Complaint further conclusorily alleges that the change of control policy was otherwise not uniformly applied, “unjustly overcharg[ed] Maher for the benefit received.”

requires payment “in excess of[] the cost of the service provided,” and “unjustly overcharg[ed] Maher as compared to other marine terminal operators,” Maher, again, provides *absolutely no facts* to support these vague conclusory allegations. 12-02 Compl. ¶¶ IV(E)-(II); see *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). Nor does Maher allege any facts to support its afterthought claim of an unreasonable refusal to deal with Maher concerning the change of control policy. 12-02 Compl. ¶ V(N).

Maher has simply not alleged any facts supporting a “reasonable inference” that the Port Authority’s actions concerning APM’s capital expenditure obligations and construction financing, or its application of the change of control policy, amount to any violation of the Shipping Act. *Iqbal*, 556 U.S. at 678. Rather, all Maher has done is point to alleged “differences” between another tenant’s lease and operation at the port, and its own, and assert, in wholly conclusory fashion, that they amount to unreasonable practices and preferences and refusals to deal. But the law is plain that such “labels and conclusions” cannot survive a motion to dismiss. *Id.* Were it otherwise, every single terminal operator could comb through another tenant’s lease, identify a difference, file an action, and cumulatively paralyze the ports and submerge the Commission in specious litigation. This must not be permitted. Accordingly, these claims must be dismissed for failure to state a claim.

3. Maher’s Claims Are Barred By The Statute Of Limitations

The Shipping Act provides that a complainant must seek reparations “within 3 years after the claim accrues.” 46 U.S.C. § 41301(a). In identifying the time of accrual, the Commission follows Supreme Court precedent that, “[g]enerally, a cause of action

accrues and the statute [of limitations] begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971); *Seatrains Gilmo, Inc. v. P.R. Mar. Shipping Auth.*, 18 S.R.R. 1079, 1081 (ALJ 1979) (applying the *Zenith* standard in construing the Shipping Act's statute of limitations). To the extent that Maher's claims concerning the Port Authority's concessions to APM and change of control practices are not already barred by collateral estoppel or insufficiently pleaded, they are in any event barred by the statute of limitations.

Maher alleges that the Port Authority's approval of APM's deferral of its capital expenditure obligations and use of allocated financing for other work was given "[o]n July 24, 2008," nearly four years before Maher filed this Complaint on March 30, 2012, 12-02 Compl. ¶¶ IV(X)-(Y), clearly outside the Shipping Act's three-year limitations period. Moreover, Maher cannot invoke the discovery rule to avoid the statute of limitations because it was plainly aware of the alleged violation and injury when it objected to the 07-01 settlement agreement in August 2008. Maher's Reply in Opp'n to the Joint Mot. for Approval of Settlement Agreement & Dismissal with Prejudice (07-01), Aug. 29, 2008, at 15; *see id.* at 36; Settlement Approval Opinion at 11; *see Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 314 (FMC 2001).

Although Maher evasively avoids alleging *any* dates as to its change-of-control claims, 12-02 Compl. ¶¶ IV(A)-(H), the filings in the 07-01 and 08-03 actions, of which the Presiding Officer may take judicial notice,⁹ set forth that the Port Authority's

⁹ *See Merswin v. Williams Cos., Inc.*, 364 F. App'x 438, 441 (10th Cir. 2010) ("It is settled that the district court can take judicial notice of its own decision and records in a prior case involving the same parties."); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 n.3 (3d Cir. 1988) (a court is entitled

“practice” of requiring consideration for changes of control was adopted in 2007. 08-03 PAFOF ¶ 266; 12-02 Compl. ¶¶ IV(A)-(B). Maher’s acquisition by RREEF Infrastructure and the payments in connection therewith—the cause of the alleged injuries to Maher—likewise occurred in 2007. 08-03 PAFOF ¶¶ 2, 266. PNCT and NYCT similarly agreed to pay negotiated change of control fees back in 2007—a fact that Maher recognized and raised in August 2008 when it objected to the 07-01 settlement agreement. Maher’s Reply in Opp’n to the Joint Mot. for Approval of Settlement Agreement & Dismissal with Prejudice (07-01), Aug. 29, 2008, at 15-17; Settlement Approval Opinion at 39. Maher does not allege which unspecified terminal operators were not required to pay consideration for changes of control. 12-02 Compl. ¶ IV(D), but, again, the only operator as to which Maher has ever raised this complaint is APM, for which the Port Authority merely acknowledged an internal restructuring in 2008. *See* Settlement Approval Opinion at 39-40.

Because Maher has plainly been aware of all of these events for over three years, its claims that the Port Authority has not uniformly applied its change of control policy; that the policy requires payment in excess of the cost of the service provided and is otherwise an unreasonable practice; that Maher was “unjustly overcharge[d]” for the benefit received and as compared with other terminal operators; that the Port Authority gave unreasonable preferences to other terminal operators; and that it unreasonably refused to deal with Maher in connection to its change of control payments are all barred

to take judicial notice of the record from a prior court proceeding between the parties); *World Line Shipping Inc. & Saïd B. Muralan (aka Sam Bustani) Order to Show Cause*, 29 S.R.R. 384, 392 n.18 (A.L.J. 2001) (“[t]he application of the doctrine of judicial notice to administrative proceedings has [been] approved”).

by the statute of limitations, insofar as Maher seeks reparations. 12-02 Compl. ¶¶ IV(E)-(H); V(B), V(I), V(N). And while Maher broadly purports to request cease and desist relief for all “aforementioned violations of the Shipping Act,” *id.* at ¶ VII(B), none of Maher’s allegations in connection with these claims plead an ongoing or future violation such that cease and desist relief would be warranted. *World Line Shipping*, 29 S.R.R. at 393 (“[t]he purpose of a cease and desist order is not to magnify legal liability for a statutory violation but to provide a means of restraining recalcitrant parties from future violations”).

For all of these reasons, Maher’s claims based on the Port Authority’s change of control practices and purported allowances granted to APM should be dismissed.

B. Maher’s Claims Based On Lease Provisions Not Found In Maher’s Lease Must Be Dismissed For Lack Of Standing And Ripeness

Maher’s next set of facially meritless claims is premised on an alleged general practice by the Port Authority of requiring certain provisions in marine terminal operator leases that Maher does not even allege was applied to its own lease. 12-02 Compl. ¶ IV(U). These claims must be dismissed both for lack of standing and lack of ripeness.

The doctrines of standing and ripeness both center on whether the plaintiff has suffered an injury in fact. Traditionally, to establish standing to bring a claim, the plaintiff must show three elements: 1) “the plaintiff must have suffered an ‘injury in fact.’” 2) “there must be a causal connection between the injury and the conduct complained of.” and 3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Similarly, “[r]ipeness has both constitutional and prudential components,” and “[t]he constitutional component of ripeness overlaps with the ‘injury in

fact' analysis for Article III Standing." *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010). "The ripeness doctrine is peculiarly a question of timing, designed to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Id.* at 1057.

Although traditional standing concepts do not apply to a petition for the Commission's exercise of "quasi-legislative" functions (*e.g.*, an investigation or rulemaking), the Commission has determined that, "[w]ith respect to most of the substantive issues arising under other statutes it administers, *e.g.*, the Shipping Act of 1984, the Commission operates as the procedural equivalent of a U.S. district court." *Petition for an Investigation of, & for Section 19 Relief from, Italian Subsidies for Carnival Cruise Line Passenger Vessels*, 26 S.R.R. 990, 999 (FMC 1993) (hereinafter "*Italian Subsidies*"). The Commission holds that "[t]he concept of standing may be appropriately applied to these quasi-judicial functions of the Commission, *e.g.*, complaint proceedings brought pursuant to section 11 of the 1984 Act and section 22 of the 1916 Act . . . respectively, in which reparations are sought." *Id.*¹⁰ As a result, the Commission requires that a complainant must have suffered injury, proximately caused by the alleged violation, as "[a]n essential element in a complainant's case for reparations." *Gov't of the Territory of Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 1509, 1563 (ALJ 2003); *see also Tradecheck, LLC v. Sea-Land Serv. Inc.*, 27 S.R.R. 334, 334-35 (FMC Settlement Officer 1995) (dismissing complaints seeking reparations where complainant "can demonstrate

¹⁰ Standing is a core issue determining jurisdiction to hear claims, and the Commission has found that "an agency must reach jurisdictional issues before addressing the merits of a case." *River Parishes Co v Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 762 (FMC 1999); *Raines v Byrd*, 521 U.S. 811, 819 (1997) ("We have always insisted on strict compliance with this jurisdictional standing requirement.")

no actual injury arising from any of the alleged violations” and “has taken no actions to resolve the procedural problem”).

Maher’s Complaint alleges violations of the Shipping Act of 1984 and seeks “reparations for [those] violations of the Shipping Act.” 12-02 Compl. ¶¶ V(A), VII(B). Therefore, Maher’s claims are subject to the requirement that it must have suffered an injury from the alleged violation to have standing to bring its claims. *Italian Subsidies*, 26 S.R.R. at 999; *Gov’t of the Territory of Guam*, 29 S.R.R. at 1563. Yet Maher brings unreasonable practice claims based on an alleged “practice of requiring lease provisions” that Maher does not even allege were contained in its own lease. 12-02 Compl. ¶¶ IV(U), V(D)-(F).

Maher alleges, in a single paragraph, that the Port Authority “has a practice of requiring lease provisions in marine terminal leases, lease extensions and/or amendments and modifications” that:

(i) unreasonably require tenants to provide general releases and/or waivers of claims, including to release PANYNJ from potential violations of the Shipping Act, (ii) require tenants to agree to liquidated damages provisions that are unreasonable, and which are designed to trigger if Shipping Act claims are brought against PANYNJ, and (iii) require lease rate renewal and/or extension provisions that purport to set future lease rates in advance in a manner not reasonably related to the cost of the services provided.

Id. at ¶ IV(U). Maher does not allege that its lease includes any of these provisions.

And, in fact, Maher’s publicly-filed lease *does not* include any such provisions. *See* EP-249, Federal Maritime Commission Agreement No. 201131. As a result, Maher has not alleged any injury from the Port Authority’s alleged practice and has no standing to request reparations on these grounds under well-established Commission precedent. *See*

Italian Subsidies, 26 S.R.R. at 999. Similarly, because Maher has suffered no injury from

the alleged practice, its unreasonable practice claims are not ripe for decision and actually never can be. *See, e.g., Wolfson*, 616 F.3d at 1058. Accordingly, Maher's claims for reparations based on these allegations must be dismissed.

To be sure, in addition to seeking reparations on all claims, Maher also sweepingly requests a cease and desist order for all "aforementioned violations of the Shipping Act," albeit not specifically as to its unreasonable lease provisions claims. 12-02 Compl. ¶ VII(B). And, if past is precedent, Maher will respond that it is entitled to seek cease and desist relief for *any* unreasonable practice, without regard to whether the Port Authority imposed that practice upon it. The Port Authority submits that such an unprecedented argument must fail.

As set forth above at p. 22 *supra*, the Commission defines standing differently depending on the claim in question, and it has recognized potentially broader standing for claims for cease and desist relief, as to which it does not impose the strict injury requirement that it does for reparations requests. *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 480, 495 (ALJ 1985) ("[a]ctual harm to the complainant is not a prerequisite to a finding of violation under section 16, First, Shipping Act, 1916," and "a finding of violation could result in the issuance of a cease and desist order"). Nonetheless, even though the Commission has broadly phrased the principle that "any person" may file "a sworn complaint alleging a violation of this Act," *see id.*, review of the governing Commission jurisprudence reveals that this principle has never been so broadly applied as would support Maher's apparent belief that it has a roving commission to bring a complaint premised on purported lease provisions *that are not contained in its own lease and do not impact it in any way*. Rather, the Commission has applied its "any person"

standard to permit claims by, for example, (1) persons who were denied their rights in violation of the Shipping Act but suffered no cognizable injury meriting reparations, *see Petchem*, 23 S.R.R. at 482, 494-95, 499; and (2) affiliates, agents, and principals of contracting parties who were harmed by violations under the contract, *see S.A. Chiarella DBA S.A. Chiarella Forwarding Co. v. Pacon Express Inc.*, 29 S.R.R. 335, 335, 337-38 (FMC 2001) (agent); *Sea-Land Dominicana S.A. & Sea-Land of P.R., Inc. v. Sea-Land Serv., Inc.*, 26 S.R.R. 184, 184-86 (ALJ 1992) (affiliate); *Chilean Nitrate Sales Corp. v. Port of San Diego*, 24 S.R.R. 920, 921-22 (FMC 1988) (principal).

The Port Authority has found no Commission case granting standing to a pure private-party interloper, unconnected with the alleged violation, to pursue a cease and desist order—as if that private party were itself an executive-branch regulatory agency. Nor would one ever expect to find such a case. It would make no sense whatsoever to permit any litigious interloper, such as Maher, bent on harassment, to rummage through the leases of other tenants—indeed, competitors—and bring a complaint based on the bargained-for provisions in those leases, which not only would not impact the interloper in any way, but which the actual lessees have not themselves sought to challenge. Even if such an interloper *could* file such a claim, nothing *compels* the Commission to adjudicate it. The Shipping Act simply does not, and should not, be construed as requiring the Commission to tolerate such unwarranted scavenging by a private litigant. Indeed, were the Commission required to countenance such a far-reaching, indeed over-reaching, use of the Shipping Act, the Commission's docket could swiftly become clogged with baseless actions by officious interlopers seeking what amount to advisory opinions on vague allegations of practices not yet applied and injuring no one.

To be sure, if the Commission believes that something is in fact amiss, the Commission is itself empowered to commence an investigation—the appropriate course of action dictated under the Shipping Act. 46 C.F.R. § 502.282 (the Commission may commence an investigation “in its discretion” when it requires information to decide “whether to institute formal proceedings directed toward determining whether any of the laws which the Commission administers have been violated”); *see also id.* at § 502.283 (“When the Commission has determined that an investigation is necessary, an Order of Investigation shall be issued.”). But the Commission is not required to allow a litigious harasser, such as Maher, to delve into the business of others that could in no way cause it harm for reasons of its own. And when the Commission believes that a cease and desist action by a private litigant serves no legitimate purpose for the litigant and exceeds what the Commission itself would choose to do as a regulator, it has ample discretion to curtail the cease and desist action or dismiss it. *See A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 25 S.R.R. 1061, 1062 (FMC 1990) (finding “no purpose to be served by issuing a cease and desist order in this proceeding” because, among other things, defendants “*have done nothing to date which would constitute a violation of law*”) (emphasis added); *Alex Parsinia d b a Pac Int’l Shipping & Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997) (“the decision to issue [cease and desist] orders lies within the sound discretion of the trial courts but || there has to be a reasonable basis for the lower court’s decision”).

Accordingly, Maher’s claims relating to the Port Authority’s alleged requirement of purportedly unreasonable lease provisions are improper in their entirety.

C. Maher Fails To State Claims Concerning The PNCT Terminal Expansion And The Letting Of The Global Terminal Upon Which Relief Can Be Granted

Maher alleges that the Port Authority granted undue preferential treatment to PNCT in granting its terminal expansion, and that the Port Authority refused to deal and negotiate with Maher for the letting of the Global terminal. *See* 12-02 Compl. ¶¶ IV(I), IV(S)-(T), IV(V)-(W), IV(Z)-(AA). Once again, Maher fails to provide sufficient factual support for these allegations, and thus these claims should be dismissed. *See Twombly*, 550 U.S. at 555 (“a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”); *see generally* pp. 14-15 *supra* (discussing standard for a motion to dismiss).

1. Maher Fails To Allege Sufficient Facts To Support Its Conclusory Allegations That The Port Authority Provided Unduly Preferential Treatment To PNCT Based On Status

Maher alleges that, at some unspecified time following MSC’s transfer of its container terminal business to PNCT’s terminal in October 2009, the Port Authority entered into an agreement with PNCT and MSC granting consent to MSC’s taking an ownership interest in PNCT, the expansion of PNCT’s terminal, and other concessions. 12-02 Compl. ¶¶ IV(L), (Q)-(R). Maher further alleges that the Port Authority did not provide the same or comparable “expansion opportunities, rate reductions, lease extension, or other preferences to Maher.” *Id.* at ¶¶ IV(S)-(T).

Once more, Maher fails to allege sufficient facts in its Complaint to support any plausible claim that the Port Authority “has an unreasonable practice of providing unduly preferential treatment to ocean carriers and ocean-carrier-affiliated marine terminals.”

including PNCT, that unduly prejudices Maher. *See* 12-02 Compl. ¶¶ IV(I), V(C). In fact, Maher fails to plead *any* facts to demonstrate *any* Shipping Act violation based on the Port Authority's approval of the expansion of the PNCT terminal and other concessions that it gave PNCT in exchange for PNCT committing to certain terminal investments and guaranteeing certain levels of MSC cargo. Maher does not even plead that it requested that the Port Authority provide it with "the same or comparable expansion opportunities, rate reductions, lease extensions, or other preferences" that PNCT received, or plead facts to support that Maher had the desire or ability to provide the same investment and cargo commitments that PNCT provided to the Port Authority in exchange for approval of a terminal expansion. *See id.* at ¶¶ IV(S)-(T), V(O). Indeed, Maher pleads no facts that even remotely tend to show that the Port Authority's new agreement with PNCT is in any way more favorable than Maher's own lease terms in any respect.

Maher's naked attack on the PNCT agreement, impermissibly "devoid" of *any* "further factual enhancement," is emblematic of the unprecedented and dangerous approach to Shipping Act liability and Commission litigation that Maher advocates, and which plainly must be rejected. *Iqbal*, 556 U.S. at 1949. Absent sufficient factual allegations, Maher's undue preference claim with regard to the PNCT allegations necessarily must fail. *See Twombly*, 550 U.S. at 678.

Given Maher's litigiousness in the past four years, had it actually believed that the Port Authority was violating the Shipping Act by agreeing to the expansion of the PNCT terminal, Maher plainly would have contemporaneously raised this issue with the Port Authority at the time the Port Authority was negotiating the agreement with PNCT. But

Maher did not; it waited over two years to raise its allegations about the Port Authority's purported preferential treatment with respect to the PNCT terminal expansion.

Accordingly, the few facts that Maher asserts concerning its conclusory allegations that the Port Authority purportedly granted undue preferential treatment to PNCT for its terminal expansion do not permit the Presiding Officer even to infer a "mere possibility of misconduct" and therefore, Maher has not shown it is entitled to relief under the

Shipping Act. *See Iqbal*, 556 U.S. at 679.

2. Maher Fails To Allege Sufficient Facts To Support Its Conclusory Allegations That The Port Authority Unreasonably Refused To Deal Or Negotiate With It For The Letting of The Global Terminal

Maher alleges that the Port Authority unreasonably refused to deal or negotiate with Maher with respect to the letting of the marine terminal facility that was leased in June 2010 to Global. Comp. ¶¶ IV(V)-(W), (Z)-(AA), V(G), V(M). As with the PNCT allegations, Maher fails to plead any factual content or support for these allegations. The vague, lone fact that Maher alleges concerning the Global lease is that it made a "request for parity" "with respect to the letting" of what is now the Global terminal. *See id.* at ¶¶ IV(AA). Maher does not allege any facts about how the Port Authority unreasonably refused to deal or negotiate with Maher for the Global terminal or how the Port Authority "unreasonably excluded Maher from consideration as a prospective operator" of the Global terminal to support the conclusory allegations in its Complaint.¹¹ *Id.* at ¶ IV(V).

¹¹ As set forth in footnote 4 *supra*, Maher not only has not but cannot plead facts to support a Shipping Act claim based on the Global lease, in light of the fact that Global itself originally owned 100 acres of the 170-acre terminal, which it transferred to the Port Authority as part of the exchange for a lease of the full 170-acre premises.

Furthermore, Maher does not even allege that it *informed* the Port Authority during the lease negotiations with Global that it believed that the Port Authority was unreasonably refusing to deal or negotiate with Maher concerning the letting of the Global terminal. Maher now brings a claim, nearly two years after the execution of the Global lease, only to harass the Port Authority and distract the Presiding Officer from the resolution of the pending 08-03 action. Clearly, Maher's blanket assertions that the Port Authority unreasonably refused to deal or negotiate with it with respect to the letting of the Global terminal lack the factual support necessary to sufficiently plead a cause of action under the Shipping Act. *See Iqbal*, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

II. To The Extent That Maher's Claims Are Not Dismissed, They Should Be Stayed Until After Resolution Of Its 08-03 Action Or, At Minimum, Until The Port Authority's Motion To Dismiss Is Decided.

To the extent that Maher's 12-02 Complaint is not dismissed—and, as discussed above, it should be dismissed in its entirety—Maher's action should be stayed until after the full resolution of its pending 08-03 action, which is nearing its conclusion. Upon the submission of supplemental briefing on a few outstanding factual issues, the Presiding Officer will issue the first major decision on the merits in the longstanding dispute between Maher and the Port Authority, and the first significant decision from the Commission and its Presiding Officers in several years on a plethora of Shipping Act issues, as discussed at pp. 33-34 *infra*. The 08-03 ruling will comprehensively determine numerous legal issues under the Shipping Act—namely, what constitutes an unreasonable preference, practice or refusal to deal—that will directly serve as the guide for determination of any remaining 12-02 claims. The 08-03 ruling will also decide claims

based on factual events identical to those that Maher challenges here, as discussed at pp. 34 *infra*. Maher should not be permitted to interfere with the enormous task before the Presiding Officer by forcing the parties into another round of wide-ranging, protracted, and inevitably contentious discovery—given Maher’s track record—that will certainly burden the Presiding Officer and obstruct resolution of the 08-03 action. Thus, Maher’s claims should be stayed until after that resolution is achieved.

At minimum, Maher’s new action should be stayed until the Presiding Officer decides the Port Authority’s motion to dismiss and determines what claims, if any, may proceed. Engaging in any discovery with Maher—in the Port Authority’s and the Presiding Officer’s more than ample experience—is unbelievably expensive, disruptive, and time-consuming. Maher has already shown that it will employ the same scorched earth tactics in this proceeding by serving dozens of overbroad and unduly burdensome interrogatories and document requests on the Port Authority together with its Complaint. To the extent that *any* of the 12-02 claims are disposed of by motion, that would eliminate the need for discovery on them, which would ease the burden on both the Port Authority and the Commission even if some of the 12-02 claims ultimately proceed.

A. The *Landis* Standard Applies To This Request For A Stay Pursuant To The Presiding Officer’s Authority Over His Own Docket

It is well-established that the Presiding Officer “has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 250, 254 (ALJ 2008) (Guthridge, J.) (the power to stay proceedings “springs from the inherent authority of every court to control the disposition of its cases.”). “[T]he power

to stay proceedings is incidental to the power inherent in every court to control the

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disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *UnionBanCal Corp. v. United States*, 93 Fed. Cl. 166, 167 (2010). “How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S. at 254-55; *accord APM*, 31 S.R.R. at 254. Thus, in deciding a motion to stay proceedings, the Presiding Officer must “balance” the interests favoring a stay against the interests frustrated by a stay, as well as “consider the Commission’s interest in conserving its resources.” *APM*, 31 S.R.R. at 254.¹²

As the Presiding Officer recognized in the 07-01 action in staying proceedings pending settlement discussions, the *Landis* test applies where, as here, the requested stay is grounded in the Presiding Officer’s inherent power to manage his own docket. *APM*, 31 S.R.R. at 254. The Presiding Officer has applied the more stringent, four-pronged *Virginia Jobbers* test to requests for a stay *pending an appeal to the Commission*, such as the stay requested by the Port Authority pending appeal in the 08-03 action. Mem. Regarding Stay Pending Appeal at 2-3 (08-03), June 9, 2011 (“08-03 Stay Order”). That test requires the movant to (1) “ma[k]e a strong showing that it is likely to prevail on the merits of its appeal.” (2) show that “without such relief, it will be irreparably injured.” (3)

¹² Because there is no possibility that “the stay for which [the Port Authority] prays will work damage to someone else.” or do Maher any harm, *see pp. 36-37 infra*, the Port Authority need not “make out a clear case of hardship or inequity in being required to go forward.” *Carolina Marine Handling, Inc. v. S.C. State Ports Auth.*, 28 S.R.R. 1595, 1598 (ALJ 2000) (quoting *Landis*, 299 U.S. at 255). Moreover, while a stay of “indefinite duration” should be granted only where the movant identifies “a pressing need,” *Landis*, 299 U.S. at 255; *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997), the Port Authority *does not* seek an indefinite stay but rather requests a moderate stay dependent upon “only one other pending action” that was also “initiated by [plaintiff in this action]” and has “a finite period for its resolution.” *In re Sacramento Mun. Util. Dist.*, 395 F. App’x 684, 688 (Fed. Cir. 2010) (“[plaintiff] has some control in that it may litigate and resolve its second claim in an efficient and expeditious manner and avoid delays to the extent possible”). *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1341 (Fed. Cir. 1983).

address whether a stay would “substantially harm other parties interested in the proceeding,” and (4) demonstrate “[w]here lies the public interest.” *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis added); *see also* 08-03 Stay Order at 3. The *Virginia Jobbers* heightened standard—which tracks the stringent requirements for a preliminary injunction and applies to requests to stay an action *pending appeal*—does *not* apply where the movant, like the Port Authority here, merely seeks a *Landis* stay based on the “inherent authority of every court to control the disposition of its cases.” *See APM*, 31 S.R.R. at 254. Otherwise, no such stays could be issued, as was the stay in the 07-01 action, because every movant would have to show irreparable harm and “mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a [*Virginia Jobbers*] stay are not enough.” *See Virginia Jobbers*, 259 F.2d at 925. *Virginia Jobbers* plainly did not abrogate *Landis* in this manner, and, thus, *Landis* applies to the stay here requested.

B. This Action Should Be Stayed Until After The Full and Final Resolution of the 08-03 Action

A stay of proceedings until after the resolution of the 08-03 litigation will serve “the Commission’s interest in conserving its resources” and furthering judicial economy, as well as serve the interests of both parties by avoiding unnecessary burden and expense. *APM*, 31 S.R.R. at 254. After five years of litigation between Maher and the Port Authority across two (and now three) separate actions, the Presiding Officer’s 08-03 merits decision will be the *very first* major decision in ten years on what constitutes an unreasonable preference or practice under the Shipping Act, since *Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997), and 29 S.R.R.

356 (FMC 2001), and *Seacon Terminals v. Port of Seattle*, 26 S.R.R. 886 (FMC 1993);

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and in eight years on what constitutes an unreasonable refusal to deal, since *Agreement No. 201158: Docking & Lease Agreement by and between City of Portland, Maine and Scotia Prince Cruises Ltd.*, 30 S.R.R. 377 (FMC 2004), and *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436 (FMC 2003). Maher’s new Complaint alleges these very same violations—unreasonable preferences, practices, and refusals to deal—based on broad theories of Shipping Act liability similar to those it relied upon in the 08-03 litigation. *See, e.g.*, 12-02 Compl. ¶ IV(S) (alleging an unreasonable preference based on PNCT’s expansion without alleging that Maher requested the same opportunities or could provide the same commitments as did PNCT as consideration); *id.* at ¶ V(K) (alleging an unreasonable preference based on APM’s use of construction financing without alleging that Maher sought and was refused permission to use its construction financing in the same way). In fact, Maher’s new Complaint even includes claims based on the *very same* factual events that Maher challenged in the 08-03 action—for example, the deferral of APM’s capital expenditure obligations and the purported exemption of APM from change of control fees.¹³ *See* 12-02 Compl. ¶¶ IV(A)-(H), IV(X), V(B), V(H)-(J), V(L). A stay of Maher’s 12-02 claims is warranted pending the Presiding Officer’s extremely significant decision on the scope and content of the

¹³ *See, e.g.*, 08-03 Initial Br. 93 & n.218 (the Port Authority allegedly awarded APM “new valuable preferences over Maher” in the settlement process, including “allowing [APM] to defer \$50 million [sic] terminal investments from 2017”); *id.* at 93-94 (“PANYNJ granted Maersk-APM new undue preferences further prejudicing Maher,” including “a financial benefit of approximately \$23 million by granting Maersk-APM deferral of terminal improvement obligations under Lease EP-248”); *see also* 08-03 Initial Br. 61 (arguing an unreasonable practice because the Port Authority required an increase in Maher’s security deposit in connection with its change of control but did not require a security deposit from APM); *id.* at 79 n.182 (contending that the Port Authority did not require any “consent fee” from APM as it did from “other Maher [sic] and other marine terminal operators”); *id.* at 93-94 & nn. 218, 220.

Shipping Act violations also at issue here, which will guide the litigation of Maher's 12-02 claims, to the extent that any claims survive the Port Authority's motion to dismiss.

In light of the significance of the Presiding Officer's merits decision in the 08-03 litigation—not just for Maher's 12-02 claims but, indeed, for Commission jurisprudence—Maher should not be permitted to distract the Presiding Officer from the weighty considerations before him by once more dragging the Port Authority into the copious, far-reaching, protracted, and antagonistic discovery that is inevitable given Maher's well-documented, overly litigious approach to Commission proceedings. Judging from extensive experience over five years of litigation, as well as the copious discovery requests that Maher already served with its Complaint, absent a stay, Maher will once again subject the Port Authority to serial rounds of voluminous, cumulative, and overreaching interrogatories and document requests, as well as myriad baseless motions to quash legitimate discovery by the Port Authority, which will subject the Presiding Officer to the resolution of countless discovery motions that are unnecessary with a normal litigant.¹⁴ In fact, Maher has already demonstrated that it will employ its customary scorched-earth tactics by serving twenty-eight interrogatories (many of them multi-pronged) and twenty-five document requests, most of which are incredibly overbroad and unduly burdensome, concurrently with its 12-02 complaint (to which the Port Authority has been compelled to respond and make comprehensive objections).

¹⁴ As also noted in footnote 1 *supra*, in the 08-03 action alone, Maher buried the Port Authority in an avalanche of serial, excessive, inordinately burdensome discovery requests, including 208 interrogatories (340 with subparts) served in twelve, mostly successive sets—more than thirteen times the presumptive limit imposed by the Federal Rules, *see* Fed. R. Civ. P. 33(a)(1) (permitting “no more than 25 written interrogatories, including all discrete subparts”) —as well as 127 document requests (158 with subparts) served in eleven, mostly successive sets. In response, the Port Authority produced over two million pages of documents and more than 250 pages of interrogatory responses at astronomical cost. Maher also subjected the Port Authority to over fifteen discovery-related motions and impermissible surreplies.

Accordingly, a stay is necessary to ease this undue burden on the Presiding Officer, as well as the Port Authority, and prevent the substantial impediment to the Presiding Officer's resolution of the 08-03 action that would otherwise be imposed by Maher's action brought for the purpose of distraction and harassment.

In balance against such significant considerations supporting a stay, there are no legitimate reasons to deny the stay. *See APM*, 31 S.R.R. at 254 (the presiding officer "must weigh competing interests and maintain an even balance"). The Port Authority requests a stay of modest duration only until the final resolution of the 08-03 action. The original merits briefing in the 08-03 action was completed last year, and the Presiding Officer simply awaits submission of supplemental briefing before the action will be *sub judice*.¹⁵ Thus, in accordance with law, the requested stay would be properly "framed in its inception" such that "its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description." *Landis*, 299 U.S. at 257.

Finally, Maher cannot credibly assert that the modest delay in discovery inherent in the proposed stay would inflict any cognizable injury upon it sufficient to counterbalance the critical need for a stay. Maher delayed for several years before raising the majority of its 12-02 claims: over three years for its claims relating to change of control practices and allowances to APM, over two years for its claims relating to the PNCT agreement, and nearly two years for its claims relating to the Global lease. Further, Maher's remaining claims relating to allegedly unreasonable lease provisions are

¹⁵ As also discussed in footnote 2 *supra*, the current delay in the supplemental briefing is *entirely due* to Maher's and its cohort Empire's bald-faced defiance of the Commission's subpoenas and the Presiding Officer's January 18 Order enforcing those subpoenas, for which the Port Authority was forced to seek enforcement in federal court. Maher cannot credibly claim injury from a delay for which it is solely responsible

not even ripe and inflict no injury upon Maher because it does not—and cannot—allege that its lease includes such provisions. Thus, the very face of Maher's Complaint plainly demonstrates that its 12-02 claims lack any urgency.

Accordingly, this action should be stayed in its entirety, to the extent that it is not dismissed, until after the merits decision of the 08-03 action.

C. Alternatively, This Action Should Be Stayed Until The Port Authority's Motion To Dismiss Is Decided

Even if the Presiding Officer declines to stay this action until after the resolution of the 08-03 action, this action should be stayed, at minimum, until the Port Authority's motion to dismiss is decided. A stay of discovery pending the determination of a motion to dismiss lies at the core of the Presiding Officer's discretion and authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *APM*, 31 S.R.R. at 254 (quoting *Landis*, 299 U.S. at 254-55). A stay of discovery into Maher's 12-02 claims pending decision of the motion to dismiss is warranted because it is likely that at least some, if not all, of Maher's claims will be dismissed. For example, as discussed above, several of Maher's claims are plainly time-barred or were already resolved in the approval of the 07-01 settlement agreement, while, as to other claims, Maher obviously lacks any standing to bring a claim or fails to plead any conceivable cause of action.

As a result, the issuance of a stay will save the parties from unnecessary discovery and motion practice by "simplify[ing] the issues, proof, and questions of law which could be expected to result from a stay," thereby serving "[t]he orderly course of justice and judicial economy." *UnionBanCal*, 93 Fed. Cl. at 167 (quoting *CMAX, Inc. v. Hall*,

300 F.2d 265, 268 (9th Cir. 1962)). A stay will also save the Presiding Officer the

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substantial burden of deciding the discovery motions that are inevitable given Maher's litigious history, including its characteristic refusal to agree to any reasonable compromises. Pending the Presiding Officer's likely reduction (or elimination) of Maher's claims, neither the Port Authority nor the Presiding Officer should be subjected to the overbroad and unduly burdensome discovery that Maher seeks, and will continue to seek absent a stay, and the contentious discovery disputes and motion practice that will inevitably ensue. Accordingly, this action should be stayed, at minimum, until after the Presiding Officer's decision on the Port Authority's motion to dismiss.

CONCLUSION

Based on the foregoing reasons, the Port Authority's motion to dismiss the 12-02 Complaint should be granted, and Maher's claims should be dismissed in their entirety with prejudice. Alternatively, if the Port Authority's motion to dismiss is denied in whole or in part, its request for a stay should be granted pending the Presiding Officer's resolution of the 08-03 litigation or, at minimum, until decision of the Port Authority's motion to dismiss.

Dated: April 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

<u>Via E-mail:</u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Rand K. Brothers Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006	Dated at Washington, DC this 26th day of April, 2012
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Consuelo A. Kendall